Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of the Petition of The United States Telecom Association For a Rulemaking to Amend Pole Attachment Rate Regulation and Complaint Procedures	)	RM-11293

COMMENTS OF THE UNITED TELECOM COUNCIL AND THE EDISON ELECTRIC INSTITUTE

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SUMMARY

Section 224 of the Communications Act expressly excludes ILECs from the class of telecommunications carriers that are entitled to regulated rates, terms and conditions, as well as nondiscriminatory access for pole attachments. The definition of a pole attachment cannot be bootstrapped to Section 224(b)(1) to construe any pole attachment rights for ILECs to exist. Such an interpretation would directly conflict with the specific rate and access provisions in Sections 224(e)-(f) that form the basis for the general authority in Section 224(b)(1) to regulate pole attachments. The Commission must interpret the statute to avoid such conflicts, and hence the specific rate and access provisions that exclude ILECs must control the general authority in Section 224(b)(1). This interpretation is consistent with the legislative history, as well as Commission and judicial precedent. It also would serve the public interest by promoting telecommunications competition and upholding the freely negotiated terms of joint use agreements that have been in place for decades. Therefore, the Commission should dismiss or deny the USTA Petition for Rulemaking without further consideration.

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Pursuant to Section 1.405(a) of the Commission's Rules, the United Telecom Council and the Edison Electric Institute hereby oppose the Petition for Rulemaking filed by the United States Telecom Association in the above-referenced proceeding.[1] The petition is unsupported in law, fact or policy, and should be dismissed or denied without further Commission action. Section 224 of the Communications Act clearly excludes incumbent local exchange carriers (ILECs) as telecommunications carriers for purposes of pole attachment regulation. This exclusion extends to rates, terms and conditions, as well as access for pole attachments. Furthermore, Commission regulation of pole attachments by ILECs would be contrary to the public interest, because it would upset the balance of joint use agreements that have been in place for decades generally and it would threaten to undermine the reliability of critical infrastructure.

[1] Petition for Rulemaking of The United States Telecom Association in RM-11293 (filed Oct. 11, 2005)(hereinafter "USTA Petition").

I. Introduction

UTC is the international trade association for the telecommunications and information technology interests of electric, gas, and water utilities, pipeline companies and other critical infrastructure industries. Its members include large investor-owned utilities that serve millions of customers, and relatively small municipal and cooperatively-organized utilities that may serve only a few thousand customers. It has advocated positions on matters affecting pole attachment regulations before the Commission, the federal appellate courts and the United States Supreme Court. Some of its members are subject to pole attachment regulation at the state or federal level, while some are specifically exempt from such regulations.[2] Practically all have joint use agreements for pole attachments with ILECs. As such, many of the members of UTC would be directly affected by the relief sought by the USTA Petition. Therefore, UTC is an interested party in opposing the USTA Petition.

The Edison Electric Institute is the association of the United States investor-owned electric utilities and industry associates worldwide. Its U.S. members serve almost 95 percent of all customers served by the shareholder segment of the U.S. industry, about 70 percent of all electricity customers, and generate about 70 percent of the electricity delivered in the U.S.. It frequently represents its U.S. members before Federal agencies, courts, and

[2] *See e.g.* 47 U.S.C. §224(a) (exempting Federal, state or municipal utilities and cooperatively organized utilities).

Congress in matters of common concern, and has filed joint comments with UTC before the Commission in various proceedings affecting the pole attachment interests of its members, who are subject to FCC and state pole attachment jurisdiction. Therefore, EEI is also an interested party and is pleased to join UTC in opposing the USTA petition

II. Section 224 Excludes ILECs from Access and Rates for Pole Attachments

a) Plain Text

Section 224(a)(5) plainly excludes ILECs from the class of telecommunications carriers that are entitled to nondiscriminatory access and regulated rates, terms and conditions for pole attachments.[3] When Congress amended Section 224 in the 1996 Telecommunications Act to regulate pole attachments used by telecommunications carriers to provide telecommunications services as well as cable television pole attachments, it used the term "telecommunications carrier" in both of the provisions it added regarding access and rates for telecommunications attachments.[4] It added Section 224(e) to direct the Commission to prescribe rates "for pole attachment used by telecommunications carriers."[5] It also added Section 224(f) to require utilities to provide "any telecommunications carrier with nondiscriminatory access" for pole attachments.[6] As ILECs are not

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[3] *See* Section 224(a)(5) (stating that for purposes of Section 224, the term "telecommunications carrier" (as defined in section 153 of this title) does not include an incumbent local exchange carrier, as defined at Section 251(h) of the Communications Act).

[4] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat.56, codified at 47 U.S.C. §151, *et seq.*

[5] *See* Section 224(e)(1) (mandating that "t[h]e Commission shall, no later than 2 years after [February 8, 1996], prescribe regulations in accordance with this subsection to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges").

[6] *See* Section 224(f)(1) (mandating that a utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it).

telecommunications carriers for purposes of Section 224, the plain text of Sections 224(e)-(f) clearly excludes ILECs from the class of telecommunications carriers that otherwise would be entitled to regulated rates or access for pole attachments.

This conclusion is unaltered by the fact that Congress used the term "provider of telecommunications service" when it amended the definition of a pole attachment.[7] USTA attempts to bootstrap the statutory definition of a pole attachment to argue that ILEC attachments are nonetheless entitled to just and reasonable rates, terms and conditions for pole attachments pursuant to Section 224(b)(1).[8] This is an implausible assertion that is directly contrary to Section 224 as a whole and overlooks the fact that a provider of telecommunications service is, by statutory definition, a telecommunications carrier.[9]

b) Legislative History and Context of the Statute as a Whole

As explained above, Congress clearly intended to exclude ILECs from regulated rates, terms and conditions, as well as access for pole attachments.

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[7] *See* Section 224(a)(4) (stating that the term "pole attachment" means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility).

[8] *See* USTA Petition at 6 (quoting Section 224(b)(1) for the proposition that it applies to ILEC attachments, merely because it refers to pole attachments generally).

[9] A fundamental canon of statutory interpretation is that congressional intent should be interpreted according to the plain meaning of the terms within the context of the statute as a whole. *See e.g.* Conroy v. Askinoff, 507 U.S. 511 (1993). Another fundamental canon is that the specific terms of a provision will govern the general terms of a statute. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384-385 (1992).

ILECs were and are the incumbent local exchange carriers and owners of poles and infrastructure that were made subject to the Act, and mandated to provide access at regulated rates, terms and conditions to new market entrants as "utilities". The fact that Congress happened to use the term "provider of telecommunications service" when defining the term "pole attachment" cannot be construed to supersede the specific provisions that clearly exclude ILECs from access and rates for pole attachments by telecommunications carriers.[10] Instead of including ILEC attachments, the legislative history clearly indicates that Congress was envisioning pole attachments by cable companies that provide telecommunications services, when it defined the term pole attachment to include "*any* attachment by a provider of telecommunications service".[11] In any event, the mere use of the term "provider of telecommunications service" as part of an isolated definition cannot be bootstrapped to Section 224(b)(1) to override the express provisions in Sections 224(a)(5), and (e)-(f) that are clearly intended to exclude ILECs from all coverage under Section 224, including regulated rates for pole attachments. In short, the general authority in Section 224(b)(1)

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[10] *Compare*, 47 U.S.C. §224(e)(1) and (f)(1) with 47 U.S.C. §224(a)(5) (effectively excluding ILEC attachments from the rate and access provisions).

[11] *See* H.R. Conf. Rep. 104-458 (explaining that the Senate version that was ultimately adopted in conference requires that poles, ducts, conduit, and rights-of-way that are owned or controlled by utilities are made available to cable television systems at rates, terms and conditions that are just and reasonable, *regardless of whether the cable system is providing cable television or telecommunications services.*" (emphasis added)). This is a clear contradiction of USTA's claim that the legislative history supports its view that Congress intended to provide regulated rates for ILEC attachments when it sought to provide access for *all* providers of telecommunications services. *Compare* USTA Petition at 8, which cannot cite any specific reference to ILECs that would indicate that Congress wanted to provide them with regulated rates, terms and conditions for pole attachments.

cannot be read to trump the specific provisions that exclude ILEC attachments, as USTA contends.

Even if USTA could ignore the limiting language within Section 224(a)(5), the fact is that the term provider of telecommunications service is no broader than the term "telecommunications carrier," as those terms appear in Section 153. Section 153(44) defines the term "telecommunications carrier" as "any provider of telecommunications service…"[12] As such, the terms are virtually interchangeable.[13] Whether an ILEC is a telecommunications carrier or a provider of telecommunications services, it is nevertheless excluded from the access and rate provisions of Section 224.[14] USTA seems to have overlooked this glaring inconsistency in arguing that Section 224(b)(1) can somehow be construed to apply more broadly to ILECs.[15] As a result, USTA runs headlong into a dead end. As the terms are essentially interchangeable, they must be interpreted consistently as they are used in the context of Section 224. Hence, the definition of a pole attachment cannot include ILEC attachments, because an ILEC cannot be

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[12] *See* 47 U.S.C. §153(44).

[13] Congress only specifically excluded call aggregators of telecommunications services as telecommunications carriers. *Id. See also*, 47 U.S.C. 224(e)(1), where both terms are used in conjunction in a manner that clearly demonstrates they were considered by Congress to be interchangeable.

[14] 47 U.S.C. §224(a)(5).

[15] *See* USTA Petition at 6, *citing* 47 U.S.C. §153(46) (defining telecommunications service, but somehow also failing to mention that a telecommunications carrier is defined as any provider of telecommunications service).

considered a provider of telecommunications service for purposes of Section 224.[16]

In the same way that the general authority to regulate pole attachments in Section 224(b)(1) must not be interpreted to conflict with the specific provisions excluding ILECs from any rights as telecommunications carriers, so must it be construed to avoid effectively granting such rights through the Commission's authority to review pole attachment complaints. Implicitly, the Commission cannot enforce just and reasonable rates, terms and conditions for pole attachments unless there is an underlying right of access or rates. ILECs have no right of access or rates, and hence no right to complain.[17]

c) Structure of the Statute

This conclusion is consistent with the structure of the statute, as well as the plain text. First, Section 224(b)(1) provides the Commission with general authority to regulate pole attachments and to ensure just and reasonable rates, terms and conditions for pole attachments, subject to the provisions of subsection (c), which allows states to reverse-preempt the FCC's

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[16] That is, because an ILEC is not a telecommunications carrier for purposes of Section 224, neither is it a provider of telecommunications service.

[17] *See Implementation of Section 703 of the Telecommunications Act of 1996; Amendment and Additions to the Commission's Rules Governing Pole Attachments*, 11 FCC Rcd. 9541, 9543 ¶6 (1996). *See also Implementation of Section 703 of the Telecommunications Act of 1996; Amendment and Additions to the Commission's Rules Governing Pole Attachments*, Report and Order, CS Docket 95-171, 13 FCC Rcd. 6777, 6781 ¶5 (1998) (stating that "an ILEC must grant other telecommunications carriers and cable operators access to its poles, even though the ILEC *has no rights under Section 224* with respect to the poles of other utilities.").

authority.[18] Immediately after these two provisions establishing jurisdiction, Congress set about defining further the terms of the Commission's general authority to set just and reasonable rates.[19] In that context, Congress added Sections 224(e)-(f), which form the basis, and are part and parcel of the provisions, for just and reasonable rates, as well as the terms and conditions for access. Thus, the notion that these provisions are somehow separable from Section 224(b)(1) and can be ignored is contradicted by the very structure of the statute.

d) Avoiding Conflicts and Contradictions

It is true that Sections 224(a)(4) and (b)(1) give the Commission broad jurisdiction over pole attachments, but these provisions cannot be read so broadly as to conflict with Section 224(a)(5), which excludes ILEC attachments from the Commission's jurisdiction. On this point, even USTA concedes that ILECs have no right of access.[20] Moreover, this is not a case where we have to argue whether the provisions pertaining to rates by

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[18] Section 224(b)(1) is entitled "Authority of Commission to regulate rates, terms, and conditions; enforcement powers; promulgation of regulations." Section 224(c) is entitled "State regulatory authority over rates, terms, and conditions; preemption; certification; circumstances constituting State regulation. "

[19] Section 224(d) is entitled "Determination of just and reasonable rates; 'usable space' defined."

[20] USTA Petition at 7 ("USTelecom is not asking the Commission to provide ILECs with access rights.")

themselves limit the Commission's jurisdiction.[21] Section 224(a)(5) does that, too.[22] In this case, regulating the rates for ILEC attachments would present a direct conflict between the general authority in Section 224(b) and the specific authority delineated in Section 224(e). In order to avoid such a conflict, the statute must be interpreted so that the specific authority controls the general.[23]

Denying ILECs any pole attachment rights is consistent with Commission precedent. The Commission has recognized that "the 1996 Act … specifically excluded incumbent local exchange carriers ("ILECs") from the definition of telecommunications carriers with rights as pole attachers."[24] The fact that the Commission has already denied ILECs pole attachment rights also further distinguishes this case from *Gulf Power II*. Whereas the

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[21] *Compare*, *National Cable & Telecomm. Ass'n. v. Gulf Power Co.*, 534 U.S. 327, 335-336 (2002)("*Gulf Power II*")(explaining that the authority granted in Section 224(b)(1) is not coextensive with that in Section 224(d) in holding that cable modem attachments are covered under Section 224, even if the cable rate in Section 224(d) does not apply.)

[22] That is, Section 224(a)(5) does limit the jurisdiction of the Commission by excluding ILECs as telecommunications carriers with rights to pole attachments.

[23] *Accord*, *Gulf Power II*, 534 U.S. at 335 (explaining that "it is true that specific statutory language should control more general language when there is a conflict between the two," but finding that there was no such conflict with regard to giving cable modem attachments the cable rate because, "nothing about the text of §§224(d) and (e), and nothing about the structure of the Act, suggest that [the cable or telecommunications rates] are the exclusive rates allowed.") Here, Section 224(a)(5) does exclude ILECs as telecommunications carriers that are covered under Sections 224(e)-(f), which would be in direct conflict with Section 224(b)(1) if that provision were interpreted to provide just and reasonable rates, terms and conditions for ILEC pole attachments.

[24] *Implementation of Section 703 of the Telecommunications Act of 1996; Amendment and Additions to the Commission's Rules Governing Pole Attachments*, Report and Order, CS Docket 95-171, 13 FCC Rcd. 6777, 6781 ¶5 (1998).

decision in *Gulf Power II* was based in part on due deference to the Commission, the opposite would be the case here.[25] As such, USTA cannot support its claim that regulating rates for ILEC attachments would be consistent with Commission or judicial precedent.[26]

Finally, the fact that the Commission's rules count ILEC attachments for purposes of apportioning the unusable space costs is inapposite to the question of whether ILECs are telecommunications carriers that are entitled to pole attachments.[27] The Commission's rules also count other attaching entities, including government entities as well as utilities themselves.[28] Under USTA's theory that ILECs are entitled to regulated rates by virtue of their being counted as attaching entities, attachments for traffic lights and power lines should be entitled to the regulated rate as well. Obviously this is not the case.

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[25] *See Gulf Power II*, 534 U.S. at 338-339, *citing Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

[26] USTA Petition at 15-17 (asserting that "Commission and Judicial Precedent Confirm That the Commission's Exercise of Authority over Pole Attachment Rates is Appropriate.")

[27] *See* USTA Petition at 17 (asserting that "surely, if ILECs are to be counted as entities responsible for paying the costs of pole use they, too, must have the right to a 'just and reasonable' pole attachment rate under Section 224(b)(1).")

[28] *Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, CS Docket No. 97-98, 16 FCC Rcd. 12, 103 at ¶59 (2001)(The term "attaching entities" includes, without limitation, and consistent with the Pole Attachment Act, any telecommunications carrier, incumbent or other local exchange carrier, cable operator, government agency, and any electric or other utility, whether or not the utility provides a telecommunications service to the public, as well as any other entity with a physical attachment to the pole.")

III. The Public Interest Would Not Be Served by Regulating ILEC Pole Attachments.

a) Introduction

USTA complains that ILECs are placed at a competitive disadvantage because CLECs have pole attachment rights and its members do not.[29] Although it concedes that pole attachment rates have remained stable and at reasonable levels in many markets, it claims that some energy utilities have demanded rate increases that are excessive.[30] It also contends that ILECs are forced to accept these terms because they are carriers of last resort and have no practical alternatives to provide service to their customers.[31] Finally, it threatens to pass the cost of pole attachments on to its customers or to reduce service altogether, if the Commission denies its petition.[32]

b) Competition and Congressional Intent

Long ago the Commission explained that, "[b]ecause, for purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier, an ILEC must grant other telecommunications carriers and cable operators access to its poles, even though the ILEC has no rights under Section 224

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[29] USTA Petition at 10-11.

[30] USTA claims that pole attachment rates have jumped 100-500% in some areas. USTA Petition at 11-12.

[31] *Id.*

[32] *Id.* at 13 ("The only practical alternatives for an ILEC faced with unreasonable rates, terms, and conditions are to reduce service, raise rates charged to customer or where possible, deploy duplicative utility pole infrastructure").

with respect to the poles of other utilities. This is consistent with Congress's intent that Section 224 promote competition by ensuring the availability of access to new telecommunications entrants."[33] As such, Congress granted pole attachment rights to CLECs as part of its overriding goal in the 1996 Act to promote competition from new entrants. Therefore, extending pole attachment rights to ILECs would frustrate congressional intent.[34]

c) Joint Use Agreements, Regulatory Impact, and the Public Interest

The reality is that ILECs and utilities typically operate under joint use agreements, under which they share the costs of maintaining pole attachments.[35] Many of these joint use agreements were based upon the premise that the respective share of poles was in parity with cost causation and responsibility, and hence no money would change hands. Many of these joint use agreements have been in place for decades, and some utilities have recently revised them to more accurately reflect the actual costs of pole attachments and the current share of pole ownership. These joint use

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[33] *Implementation of Section 703 of the Telecommunications Act of 1996; Amendment and Additions to the Commission's Rules Governing Pole Attachments*, Report and Order, CS Docket 95-171, 13 FCC Rcd. 6777, 6781 ¶5 (1998), *citing* Conference Report to S. 652 and Joint Explanatory Statement of the Committee of Conference, 104th Cong., 2d Sess. 98-100, 113. Note also that the ILECs did not object to this interpretation by filing a petition for reconsideration or a petition for review at the time the Commission made it. The failure to oppose it in a timely manner indicates that ILECs tacitly agreed with it, and at the least cannot be remedied this many years later.

[34] Given that ILECs currently dominate the telecommunications market, pole attachments do not appear to be placing them at a competitive disadvantage with CLECs.

[35] Joint use arrangements avoid duplicative infrastructure which promotes the public interest both in economic efficiency and aesthetic impact.

agreements were often revised through bilateral negotiations.

UTC informally surveyed its members to determine if any had dramatically increased their pole attachment charges, as alleged by USTA.[36] The results of the survey confirmed that any significant increases in the charges were a reflection that the joint use agreements were old and out of date, and that the actual increase itself was not unreasonable, but was based on cost increases and decreases in both ILEC pole ownership and pole maintenance activity. In addition, in almost every case the ILEC increased its charges for utility attachments on ILEC poles by the same or a comparable amount. Moreover, even USTA concedes that most joint use agreements have remained unchanged. As such, the percentage figures that USTA quotes are at best misleading and anecdotal.

It is also ridiculous for USTA to suggest that ILECs are forced to accept the demands of energy utilities.[37] First, energy utilities are the ones that bear an increasing share of the costs of pole attachments. Moreover, ILECs are perfectly capable of negotiating joint use agreements with energy utilities.[38] Utilities own poles, but so do ILECs -- and they rely on each other. Moreover, most ILECs are significant forces in the American economy,

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[36] Thirty-five companies responded to the survey. Those thirty five companies serve 30 million customers and operate in service territories covering over 1 million square miles of the country. They also have over 390 active joint use agreements and over 50 active joint-ownership agreements. The companies that responded included investor-owned, cooperative and municipal utilities.

[37] USTA Petition at 11-12.

[38] This is self-evident by the joint use and joint ownership agreements that have been negotiated for decades.

with sophisticated bargaining expertise. Hence, it is absurd to argue that there is an uneven playing field here. Nor is there any support for the USTA contention that "large energy utilities"[39] have actually made any unreasonable demands on ILECs. As such, there is no compelling reason for the Commission to regulate the rates, terms and conditions for ILEC pole attachments, and the Commission should resist the request by USTA to do so.[40]

IV. Conclusion

The statute clearly excludes ILECs from all parts of Section 224, including regulated rates, terms and conditions, as well as access for pole attachments. There is no ambiguity or gap to fill here. Congress gave CLECs pole attachment rights in order to promote competition, as the Commission itself recognized. Conversely, extending those rights to ILECs would negate the overriding purpose of the 1996 Act amendments to promote telephony competition. It is not for the Commission to decide whether Congress was fair in denying ILECs pole attachment rights or that it was bad public policy to do so. Instead, the Commission must faithfully apply the express language of the statute to exclude ILECs entirely from any pole attachment rights under Section 224.

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[39] *Id.; see* USTA Petition at 11.

[40] *See* USTA Petition at 13-14.

WHEREFORE, THE PREMISES CONSIDERED, UTC and EEI oppose the USTA petition, and urge the Commission to dismiss or deny it without further consideration.

Respectfully submitted,

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